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In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5346

MALCOLM F. HICKS,
PETITIONER,

v.

PHILIP J. PICARD,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals (Pet. App. A1)[1] is not yet reported. The opinion of the District Court (Pet.

[1] References "Pet. App." are to the appendix to the petition for a writ of certiorari filed by the petitioner in this Court.

App. A5) is not reported. The opinion of the Massachusetts Supreme Judicial Court is reported at 1969 Mass. Adv. Sh. 1327, 252 N.E. 2d 880 (1969), (Pet. App. A10).

Jurisdiction

The judgment of the Court of Appeals was entered on May 26, 1971. The petition for a writ of certiorari was filed on August 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether the court below properly denied petitioner's application for a certificate of probable cause as against his claim that the state trial judge erroneously permitted the prosecution to cross-examine petitioner at a voir dire on matters irrelevant to the purpose of the voir dire.
2. Whether the court below properly denied petitioner's application for a certificate of probable cause as against his claim that the state trial judge erred in not instructing the jury on the crime of involuntary manslaughter.

Statement

After a jury trial, petitioner and a co-defendant were convicted in the Suffolk County Superior Court of murder in the second degree in violation of Mass. Gen. Laws, ch. 265, §1. The convictions were unanimously affirmed by the Massachusetts Supreme Judicial Court. *Commonwealth* v. *Hicks*, 1969 Mass. Adv. Sh. 1327, 252 N.E. 2d 880 (1969). In April of 1970 the petitioner filed *pro se* a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. On or about June 9, 1970, appointed counsel filed an amended petition for a writ of

habeas corpus. The amended petition was dismissed by the district court on March 31, 1971. On May 26, 1971, the Court of Appeals for the First Circuit, in a two page opinion, denied petitioner's application for a certificate of probable cause to appeal. See 28 U.S.C. 2253.

The evidence is summarized in the opinion of the Massachusetts Supreme Judicial Court. 1969 Mass. Adv. Sh. at 1327-1328, 252 N.E. 2d at 881 (1969).

Argument

A. The State Trial Judge Committed No Error in Allowing the Prosecuting Attorney to Ask the Petitioner Certain Questions on Cross-Examination at a Voir Dire held at the Behest of the Petitioner.

1. At the voir dire hearing on petitioner's "motion for appropriate relief", the petitioner voluntarily took the stand to testify in his own behalf (Tr. 185).[2] On direct examination the petitioner told of the circumstances of his arrest in South Boston at approximately midnight of August 28-29, 1967 (Tr. 191-192); of his being viewed by one Michael Gannon while petitioner was sitting in a police cruiser (Tr. 195); and of the events that then took place at the South Boston police station during the ensuing three hour period (Tr. 197-209 incl.). Petitioner was challenging the legality of his arrest and the exhibition of his person to witnesses at the police station.

In taking the witness stand, the petitioner waived his privilege against self-incrimination to the extent of the matters elicited on direct examination. Questions posed on cross-examination could properly be objected to if they

[2] References "Tr." are to the transcript of the state court trial which transcript was introduced as an exhibit in the federal district court.

were irrelevant to the subject matter of the hearing. If they were in fact relevant, answers to such questions could not be held to infringe upon petitioner's constitutional right to be free from self-incrimination.

The prosecuting attorney's first question on cross-examination concerned how much the petitioner may have been drinking during the hours preceding his arrest (Tr. 209). Over defense counsel's objection, the judge found the question relevant on the credibility of petitioner's testimony given on direct examination (Tr. 209). Having established that the petitioner had been drinking on the day in question, the prosecution then asked at what time the drinking had started (Tr. 210). Petitioner stated that he had his first drink about 11:00 a.m. (Tr. 210). The prosecution then attempted to develop the extent of petitioner's drinking from 11:00 a.m. to the time of his arrest at approximately 12:00 o'clock midnight (Tr. 211-222 incl.). As the petitioner testified to further drinking throughout the day and into the evening, the judge allowed the prosecuting attorney to test the recollection of the petitioner during the drinking period itself. Over defense counsel's objections the court allowed questions as to where and with whom the drinking took place. Clearly, the court found these questions relevant as a test of the reliability of the petitioner's recollection of the drinking period itself (Tr. 209, 211).

It is well settled that the scope of cross-examination is within the sound discretion of the trial judge. The logical reasoning of the trial judge in the instant case clearly demonstrates that there was no abuse of that discretion.

Assuming, arguendo, that the trial judge erred in requiring petitioner to answer certain questions at the voir dire, it is respondent's contention that petitioner was in no way prejudiced. Neither he nor his co-defendant testified before the jury. Moreover, the Massachusetts Supreme Judicial

Court found as a fact[3] that no statement made by petitioner under cross-examination at the voir dire was introduced before the jury. *Commonwealth* v. *Hicks*, 1969 Mass. Adv. Sh. at 1330, 252 N.E. 2d at 882 (1969). This finding is presumed to be correct in accordance with 28 U.S.C. 2254 (d). The federal district court found that petitioner failed to demonstrate that during the voir dire the prosecution learned of evidence previously unknown to it (Pet. App. A6).

To the contrary, the federal district court found (Pet. App. A6), and the federal appeals court agreed (Pet. App. A2), that the information elicited from the petitioner on cross-examination at the voir dire was already known to the prosecution and was available in the form of testimony. A reading of the transcript shows that the prosecution obtained no new information from the petitioner during the voir dire examination. Petitioner would have this Court believe that the prosecution did not know where or with whom petitioner was for the twelve hours preceding his arrest and that the prosecution did not know of the existence of bartenders Burham and Baluknonis prior to the cross-examination of the petitioner. (See petition for a writ of certiorari, p. 10). However, the transcript reveals that the prosecuting attorney was the person who *first* mentioned the names Balukonis (Tr. 218) and Burham (Tr. 222), and that these two bartenders were already present in court before the petitioner testified at the voir dire (Tr. 223). Burham and Balukonis, it is clear, were present in court and were waiting to testify on behalf of the Commonwealth. The transcript shows the prosecution was well aware of the identity of the bartenders before the petitioner ever took the witness stand.

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[3] The Massachusetts Supreme Judicial Court reviewed the case according to the provisions of Mass. Gen. Laws, c. 278 §§33A-33G which requires that in a capital case, such as the instant one, the Court will review the whole case including the trial transcript.

Additionally, the transcript fails to show that the petitioner made any objection to the admission of evidence that could be thought to be in any way related to petitioner's testimony on cross-examination.

As the lower court pointed out in this case "[u]nder *Simmons* v. *United States,* 390 U.S. 377, 394 (1968), even petitioner's own testimony at the voir dire may be admitted at trial if he makes no objection." (Pet. App. A2).

B. The State Trial Judge Did Not Err in his Instructions to the Jury when he Did Not Charge the Jury on the Crime of Involuntary Manslaughter.

1. A search of the transcript of the trial reveals no request by defense counsel for an instruction on the crime of *involuntary* manslaughter. This issue was never brought to the attention of the trial judge but was first raised in the appeal to the Massachusetts Supreme Judicial Court. Instructions were given on voluntary manslaughter. Petitioner should not now be heard to complain of a matter never brought to the attention of the trial judge.

Compare *Cohen* v. *United States,* 297 F. 2d 760 (9th Cir. 1962), cert. denied, 369 U.S. 865 (1962) and Fed. R. Crim. P. 30.

The United States Constitution requires only that the accused be informed of the nature of the crime with which he is charged and that he be tried under defined procedural safeguards. Respondent's research has revealed no case even tending to indicate that the lesser-included offense doctrine is of United States Constitutional origin, and the absence of such authority, it is suggested, clearly demonstrates the lack of merit to this claim. Petitioner seems to be alleging that the Constitution requires that a jury be permitted to compromise its verdict by finding an accused guilty of a lesser-included offense. However, nothing in the

Constitution requires a trial judge to instruct a jury as to a lesser-included offense. Plainly, petitioner's allegations fall short of reaching any constitutional dimension.

2. Even if it could be considered that the lesser-included offense doctrine is constitutionally inspired, that doctrine is applicable only ". . . where the charged greater offense requires the jury to find a *disputed factual element* which is not required for conviction of the lesser-included offense." *Sansone* v. *United States,* 380 U.S. 343, 350 (1965) (Emphasis added). In the instant case, the Massachusetts Supreme Judicial Court fully reviewed the relevant evidence[4] and concluded that there was no question but that the victim's death was caused by "one or more *intentional, forceful* and *deliberate* kicks to his stomach as he was lying on his back." 1969 Mass. Adv. Sh. at 1329, 252 N.E. 2d at 882 (1969). (Emphasis added).

The petitioner introduced no evidence that was contrary to this finding.

Conclusion

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4] See footnote 3, *supra.*